Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 75-329

October Term, 1975

No.

ROBERT R. KAUFMAN,
Petitioner.

v.

JAMES R. DUMPSON, Administrator of the Human Resources Administration of the City of New York,
Respondent.

Petition for A Writ of Certiorari to the Appellate Division Second Department, of the Supreme Court of the State of New York and the Court of Appeals of the State of New York.

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5. The hearing was illegal and deprived petitioner of due process since the person who brought the charges and tried petitioner and judged and sentenced him was the same as the one complaing.
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IN THE
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Respondent.

Petition for A Writ of Certiorari to the Appellate Division Second Department, of the Supreme Court of the State of New York and the Court of Appeals of the State of New York.

Petitioner prays that a writ of certiorari issue to review the orders of the Appellate Division of the Supreme Court Second Department entered September 19, 1974, and the Court of Appeals of the State of New York entered January 20, 1975.

OPINION BELOW

The Courts below wrote no opinions.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3), and under 28 U.S.C. 1254

The Ruling Below and the Reasons for Granting Certiorari

The Appellate Division below dismissed the petition and affirmed the determination of the Respondent. The Court of Appeals dismissed petitioner's appeal as of right upon the ground that no substantial constitutional question is directly involved.

STATEMENT OF CASE

This was an Article 78 proceeding for a judgment reviewing and annulling a determination of the respondent, dismissing petitioner from his position as Caseworker II Administrative Assistant to the Senior Case Supervisor, in the Department of Human Resources Administration. The original petition of March 18, 1974 was brought in the Supreme Court Kings County, to annul the determination dated March 6, 1974. The matter was referred to the Appellate Division Second Department on May 1, 1974. The Appellate Division dismissed the petition September 19, 1974. Petitioner applied to the Appellate Division for leave to appeal to the Court of Appeals, which application was denied November 6, 1974. Petitioner, on November 8, 1974, duly served and filed a notice of appeal to the Court of Appeals as of right reciting that substantial constitutional questions were directly involved. The Court of Appeals granted respondent's motion to dismiss the appeal upon the ground that no substantial constitutional question was directly involved, by order entered January 20, 1975.

Petitioner applied to the Court of Appeals on February 10, 1975 for leave to appeal to the Court of Appeals. This was

denied on March 19, 1975. On May 5, 1975 petitioner applied to the Court of Appeals for reargument and reconsideration of the motion made February 10, 1975 and the order of dismissal of the appeal taken as of right, entered January 20, 1975. This motion was denied June 4, 1975. On July 25, 1975 Petitioner moved in the Appellate Division of the Supreme Court, Second Department for reargument and reconsideration, on the ground that in a case before them which was decided after this proceeding, the Court had recognized and ruled that similar violations of the rights of the defendant had occurred and they had ruled in his favor. This motion was denied.

Petitioner was employed by the City of New York since October 2, 1966. He was appointed and certified from a Civil Service list after a competitive examination. This was his eighth year with the department. On February 16, 1972 he was promoted to Narcotic Addiction Specialist and Addiction Coordinator. On October 2, 1973 petitioner was promoted to Administrative Assistant to the Senior Case Supervisor of the Wyckoff Center, who was in fact the Assistant Director of said center, in Brooklyn, New York.

The charges involved alleged insubordination. Petitioner was not advised of and did not receive a copy of the report or decision of the examiner until after the Article 78 proceeding had been scheduled before the New York Supreme Court, although he asked for the same on many occasions. The New York Civil Service Law, sections 75 and 76, provide for a copy to be supplied on demand.

The Court below held that no substantial constitutional question was directly involved despite the fact that Petitioner was deprived of his right to cross examination. Petitioner was prevented from cross examining on motive and required to confine himself to the testimony of the respondent's witness on direct (SMP 26, 29). In *Hecht v. Monoghan*, 307 N.Y. 471,

474, the Court of Appeals held:

> One of the fundamental aspects of constitutional due process in conduct of such a hearing is the right of cross examination.

The Court went on to say that the denial of the same was in fact a denial of due process. In the case at bar the charges were insubordination — *NO MORAL TUPRITUDE — NO ACT OF VIOLATION OF PROPERTY OR PERSON.* It was a one to one test. It was essential to examine the witness Schneider and the witness Epstein, the complainants, on their individual complaints as former supervisors. Their testimony was not tied in with the isolated complaints. It was essential to cross examine these witnesses and determine their possible motive and ulterior purposes in bringing the complaints and search out the truth. These ulterior motives were claimed by petitioner herein in his answer and the hearing examiner foreclosed the examination. Hence the denial of due process and an invasion of petitioner's constitutional guarantees as provided in the Fourteenth Amendment. Petitioner gave early notice that he claimed and alleged the invasion of his federal constitutional rights. These federal questions were raised by petitioner in his petition as well as his reply to the answer filed thereto, and his answer to respondent's charges.

Petitioner was found guilty of matters with which he was never charged and he never received notice that he was called upon to defend himself against. This constituted a direct violation of petitioner's constitutional rights as provided by the Fourteenth Amendment:

> AMENDMENT XIV
> Section 1. . . . nor shall any state deprive any person of life, liberty, or property without due process of law, . . .

The hearing examiner conceded she had consulted matter not in evidence and outside of the hearing.

This was in the nature of an alleged personnel file. Petitioner never saw this file nor was he given notice that this would be charged against him, nor what it consists of was kept completely from him. A violation of the Federal due process clause was claimed. No service was ever made on the petitioner of the papers contained therein. The respondent offered petitioner a thirty-day suspension but the hearing officer consulted other papers and matter not at the hearing and not in evidence. Petitioner's dismissal resulted.

The court below overlooked the many and prejudicial errors which occurred during the course of the hearing and the fact that the transgressions were of such quality and quantity as to severely prejudice and invade the constitutional safeguards afforded petitioner. The Appellate Division below so held on March 28, 1975 that such violations of a party's rights warranted reversal, *People v. Mackell*, N.Y.L.J. April 1, 1975. This court held *In Re Ruffalo*, 390 U.S. 544 that a defendant is entitled to procedural due process which includes fair notice of the charge.

The court observed further at 390 U.S. 551: "The charge must be known before the proceedings commence." The opinion concluded that "This absence of fair notice and the precise nature of the charges deprived petitioner of procedural due process." 390 U.S. at 552.

As the Court noted in *In Re Gault*, 387 U.S. 133:

> "Notice, to comply with due process requirements must be given sufficiently in advance of court proceedings so that reasonable opportunity to prepare will be afforded, and it must set forth the alleged misconduct with particularity."

Petitioner was denied a fair trial and an impartial trial and hence was denied due process. Petitioner sought to refer to his

answer to the charges which he duly served and filed with respondent. Petitioner sought to obtain the consideration of the hearing examiner to the motion he sought to make. He made an offer of proof when he was refused this opportunity. The hearing examiner stated, she had not read the answer, nor the affirmative defenses and she would not consider them, since she said:

> they are not available to her, nor to us at this hearing, and she would not permit any such submissions based thereon. (SMP 26, 27).

Hence, petitioner was denied a full and fair trial, an impartial trial, and he was denied due process.

Our courts have held:

> An overriding consideration is the insistence upon a fair trial and impartial trial. Where that has been denied a defendant it will not do to say that despite such denial, his guilt was clearly established.

The petitioner was presumed to be innocent until and unless proved guilty. The burden of proving incompetency or misconduct shall be upon the person alleging the same. By shifting this burden respondent has been guilty of invading the constitutional rights of petitioner and denying him due process.

The petitioner was being charged, tried, judged and prosecuted by the same person, namely, the respondent, and as such was denied constitutional due process. The hearing officer was a current employee of the respondent. The answer, petition and reply submitted by petitioner alleges the illegality and federal constitutional violations. Mr. Justice White of this Court held in the case of *Arnett v. Kennedy*, 416 U.S. 134:

> The employee in this case was denied due process by the fact that he was being judged by the very person that he

> was accused of attacking. Here the petitioner was being charged, tried, prosecuted and judged by the respondent.

It is respectfully submitted that this conflict precluded the possibility of a full and fair trial and hence there was a denial of due process.

The determination below and the sanctions imposed are shocking to one's sense of fairness. They are disproportionate to the offense charged and the punishment prescribed constitutes cruel and unusual punishment inflicted in violation of Article VIII of the United States Constitution.

> AMENDMENT VIII:
> Excessive bail shall not be required, nor excessive fines imposed . . ., nor cruel and unusual punishments inflicted.

Petitioner was offered a thirty-day suspension, and when he refused and asked for a Civil Service hearing under Sections 75 and 76 of the Civil Service Law, which is his guaranteed right, he was dismissed.

This Court has held that a refusal to construe basic presumptions, and basic rights of a defendant violates a fundamental and cardinal principle of due process. This Court has held that no inference of wrongdoing can be drawn, and that all persons are innocent until proved guilty. *Slochower v. Board of Higher Education of the City of New York*, 350 U.S 551; *Quinn v. United States*, 349 U.S. 155.

The hearing officer report states:

> I find that respondent failed to substantiate by a written authority, his conclusion that he was entitled to use his time to work on his grievance.

By so shifting the burden and not ruling on over 90% of petitioner's objections, the examiner has seriously violated the constitutional rights of respondent and deprived him of a full and fair trial and constitutional due process.

CONCLUSION

For all of the foregoing reasons, this petition for a writ should be granted.

Respectfully submitted,

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Attorney for Petitioner
Appearing Pro Se.

Appendix

APPENDIX A—ORDER OF APPELLATE DIVISION

No. 3260

In the Matter of Robert R. Kaufman, petitioner, v. James R. Dumpson, Administrator of the Human Resources Administration of the City of New York, respondent.

Motion by petitioner for reargument, reconsideration and renewal of proceeding which was dismissed by order of this court dated September 19, 1974 and upon said reargument and reconsideration, to recall and vacate said order which confirmed respondent's determination.

Motion denied.

LATHAM, Acting P.J., COHALAN, BRENNAN and SHAPIRO, JJ., concur.

APPENDIX B—ORDER DENYING REARGUMENT

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the FOURTH day of June A.D. 1975.

PRESENT, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

Mo. No. 407
In the Matter of
the Application of Robert R. Kaufman,
Appellant,
vs.
James R. Dumpson, Administrator of the Human Resources Administration of the City of New York,
Respondent.

A motion for reargument of a motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

s/ Joseph W. Bellacosa
Clerk of the Court.

APPENDIX C—ORDER DENYING LEAVE TO APPEAL

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of March A.D. 1975.

PRESENT, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

(Same Title)

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

s/ Joseph W. Bellacosa
Clerk

APPENDIX D—ORDER DISMISSING APPEAL

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twentieth day of January A.D. 1975.

PRESENT, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

(Same Title)

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

s/ James N. Flavin
Acting Clerk

APPENDIX E—ORDER DENYING PREFERENCE

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twentieth day of January A.D. 1975.

PRESENT, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

(Same Title)

A cross-motion for a preference in the above cause having been made upon the part of appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said cross-motion be and the same hereby is dismissed as academic.

s/ James N. Flavin
Acting Clerk

APPENDIX F—ORDER OF APPELLATE DIVISION DISMISSING PROCEEDING

At a term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on September 19, 1974.

HON. HENRY J. LATHAM, Acting Presiding Justice,
HON. J. IRWIN SHAPIRO,
HON. JOHN P. COHALAN, JR., *Associate Justices*
HON. ARTHUR D. BRENNAN
HON. A. DAVID BENJAMIN

(Same Title)

The above named Robert R. Kaufman, petitioner, having instituted this proceeding pursuant to article 78 of the CPLR, by a petition verified March 16, 1974, to review a determination of the respondent, dated March 6, 1974; the respondent having filed an answer thereto; by order of the Supreme Court, Kings County, dated May 1, 1974, the proceeding was transferred to this court for determination; and the proceeding having been submitted by Robert R. Kaufman, petitioner in person, and submitted by Ellen Kramer Sawyer, Esq., of counsel for the respondent; due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof; it is unanimously

ORDERED that the proceeding is hereby dismissed on the merits and respondent's determination confirmed, without costs.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division.

APPENDIX G - Excerpts from Sections 75 and 76 of the Civil Service Law

HUMAN RESOURCES ADMINISTRATION
Employee Discipline Division

SECTIONS 75 AND 76 OF THE CIVIL SERVICE LAW

Section 75. Removal and Other Disciplinary Action

1. Removal and other disciplinary action. A person described in paragraph (a), or paragraph (b), or paragraph (c), or paragraph (d) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hering upon stated charges pursuant to this section.

(a) A person holding a position by permanent appointment in the competitive class of classified civil service, or

(b) a person holding a position by permanent appointment or employment in the classified service of the state or in the several cities, counties, towns, or villages thereof, or in any other political or civil division of the state or of a municipality, or in the public school service, or in any public or special district, or in the service of any authority, commission or board, or in any other branch of public service, who is an honorable discharged member of the armed forces of the United States having served therein as such member in time of war as defined in section eighty-five of this chapter, or who is an exempt volunteer fireman as defined in the general municipal law, except when a person described in this paragraph holds the position of private secretary, cashier or deputy of any official or department, or

(c) an employee in the state service holding a position in the non-competitive class other than a position designated in the rules of the state civil service commission as confidential or requiring the performance of functions influencing policy, who since his last entry into the state service has completed at least five years of continuous service in the non-competitive

class in a position or positions not so designated in the rules as confidential or requiring the performance of functions influencing policy, or

* * * * * 2. Procedure. A person against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons thereof, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing. The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for that purpose. In case a deputy or other person is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such office or body for review and decision. The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, and shall allow him to summon witnesses in his behalf. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Compliance with technical rules of evidence shall not be required.

* * * * *

4 Notwithstanding any other provision of law, no removal or disciplinary proceeding shall be commenced more than three years after the occurrence of the alleged incompetency or misconduct complained of and described in the charges provided, however, that such limitation shall not apply where the incompetency or misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime.

Sec. 76. Appeals from Determinations in Disciplinary Proceedings

1. Appeals. Any officer or employee believing himself aggrieved by a penalty or punishment of demotion in or dismissal from the service, or suspension without pay, or a fine, imposed pursuant to the provisions of section seventy-five of

this chapter, may appeal from such determination either by an application to the state or municipal commission having jurisdiction, or by an application to the court in accordance with the provisions of article seventy-eight of the civil practice law and rules. If such person elects to appeal to such civil service commission, he shall file such appeal in writing within twenty days after service of written notice of the determination to be reviewed, such written notice to be delivered personally or by registered mail to the last known address of such person and when notice is given by registered mail, such person shall be allowed an additional three days in which to file such appeal.

2. Procedure on appeal. Where appeal is taken to the state or municipal commission having jurisdiction, such commission shall review the record of the disciplinary proceeding and the transcript of the hearing, and shall determine such appeal on the basis of such record and transcript and such oral or written argument as the commission may determine. The commission may direct that such appeal shall be heard by one or more members of the commission or by a person or persons designated by the commission to hear such appeal on its behalf, who shall report thereon with recommendations to the commission. Upon such appeal the commission shall permit the employee to be represented by counsel.

* * * * *